UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

AVA J. PATTERSON and RON PATTERSON, Plaintiffs, vs. UNITED STATES OF AMERICA, *ex rel* U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT and RALPH JONES COMPANY, INC., Defendants.	)	CASE NO. 93-C-110-B

ORDER

This matter comes on before the court upon the stipulation of all parties and the court being fully advised in the premises, orders, adjudges and decrees that all claims asserted herein by plaintiffs, Ava J. Patterson and Ron Patterson, against the defendants, and by third-party plaintiff, Ralph L. Jones Company, Inc., against the United States of America, are hereby dismissed with prejudice.

Dated this 8 day of Dec, 1993.

UNITED STATES DISTRICT JUDGE

Patterson v. United States, et al
Order of Dismissal

APPROVED AS TO CONTENT AND FORM:

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Ralph L. Jones Company, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHAPARRAL CREEK, LTD., STONEBROOK, LTD., AND PCA-THE LODGE LIMITED PARTNERSHIP,	)	
Plaintiffs,	)	
v.	)	
E-CHAPARRAL ASSOCIATES LIMITED PARTNERSHIP, E-STONEBROOK ASSOCIATES, and E-LODGE ASSOCIATES LIMITED PARTNERSHIP,	)	
Defendants.	)	Case No. 93-C-679 E

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

PURSUANT to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the parties in the above-styled and numbered action hereby dismiss with prejudice their respective claims which are asserted or have attempted to be asserted by way of the Complaint, Counterclaims or any other pleadings filed in this matter. Further, each party shall bear its respective costs and attorney fees.

Dated this 10th day of December, 1993.

GARDERE & WYNNE

By: _____
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ATTORNEYS FOR PLAINTIFFS

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and

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ATTORNEYS FOR DEFENDANTS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

In re:	
DUANE ALAN HIGGINS,	District Ct. No. 93-C-578-B
Debtor,	Case No. 92-01703-C (Chapter 7)
THE F&M BANK & TRUST COMPANY, an Oklahoma banking corporation,	
Plaintiff,	
DUANE ALAN HIGGINS,	Adversary No. 92-0276-C
Defendant.	

ORDER

By its Order of October 26, 1993, the Court, finding that the issues had not been addressed in Defendant's motion (docket entry # 1), directed the Defendant to respond to Plaintiff's objection on or before November 10, 1993. In such response, filed on November 10, 1993, Defendant states the Motion to Withdraw the Reference is moot in light of Bankruptcy Judge Covey's Order of August 9, 1993. Accordingly, this case is herewith dismissed.

IT IS SO ORDERED, this 8 day of December, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN RIDLEY,

Plaintiff,

v.

RAY RASHKIN ASSOCIATES, INC., and BENEFIT CLAIMS PAYORS, INC., a foreign corporation,

Defendants.

No. 93-C-697B

STIPULATION OF DISMISSAL WITH PREJUDICE

It is hereby stipulated that the above-entitled action may be dismissed with prejudice as to the Plaintiff's claims against the Defendants, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure.

DATED this 23 day of November, 1993.

THE HUMPHREYS LAW FIRM

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(Signatures continued)

FELDMAN, HALL, FRANDEN,
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Attorneys for Defendant, Ray Rashkin Associates, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FRED MARVEL, AND ANGELA MARVEL

Plaintiffs,

vs.

FINANCIAL RATES, INC,. AMERICAN GENERAL FINANCIAL CENTER THRIFT COMPANY, AND AMERICAN GENERAL FINANCE COMPANY,

Defendants.

Case No. 92-C-206-B

O R D E R

Now before the Court is the objection of Plaintiffs Fred and Angela Marvel (docket # 143) to the Report and Recommendation of the United States Magistrate Judge (docket # 139) Regarding Plaintiffs' Motions To Proceed As A Class In Their Third, Sixth And Seventh Causes Of Action (docket #'s 98 and 99)[1]. The Magistrate recommended that Plaintiffs' motions be denied as moot as to Plaintiffs' third, sixth, and seventh claims, due to his previous recommendation that these claims be dismissed for failure to state a claim. No objections or exceptions have been filed as to the ruling on the third claim and the time for filing such exceptions

[1] Plaintiffs filed a Motion to Proceed As A Class As To Third And Second Causes Of Action (docket #98) and a Motion To Proceed As A Class As To Sixth And Seventh Causes Of Action (docket #99). The Report and Recommendation of the Magistrate only considered Plaintiffs motions as to Plaintiffs third, sixth, and seventh causes of action. The Motion to Proceed As A Class As To The Second Cause of Action is still before the Magistrate Judge at this time.

or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the Magistrate as to the motion to proceed as a class in Plaintiffs' third claim should be and hereby is adopted and affirmed. The Court further finds that due to its adoption of the Magistrate's Report and Recommendation regarding dismissal of Plaintiffs' sixth and seventh claims under the Lanham Act, the motion to proceed as a class as to these claims should also be denied as moot.

IT IS SO ORDERED THIS 8th DAY OF DECEMBER, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FRED MARVEL and ANGELA MARVEL,

Plaintiffs,

vs.

FINANCIAL RATES, INC., AMERICAN GENERAL FINANCIAL CENTER THRIFT COMPANY, and AMERICAN GENERAL FINANCE COMPANY,

Defendants.

Case No. 92-C-206-B

ORDER

Now before the Court is the objection of Plaintiffs Fred and Angela Marvel (docket # 144) and the partial objection of American General Financial Center Thrift Co.(AGFCTC)(docket # 142) to the Report and Recommendation of the United States Magistrate Judge (docket # 137) regarding AGFCTC's motion for partial summary judgment (docket # 95). The Magistrate Judge recommended that the motion for partial summary judgment should be denied as to Plaintiffs' first claim for relief and granted as to Plaintiffs' fourth claim for relief. No exceptions or objections have been filed as to these rulings, and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the Magistrate as to the motion for summary judgment as to Plaintiffs' first and fourth claims should be and hereby is adopted and

147

affirmed.

The Report and Recommendation contained a recommendation that the motion for summary judgment as to Plaintiffs' second claim for relief be denied and the motion for summary judgment as to Plaintiffs' sixth and seventh claims for relief be granted. Plaintiffs timely filed an objection to recommendation regarding the sixth and seventh claims and Defendant timely filed an objection regarding the second claim for relief.

Statement of the Case

American General Financial Center Thrift Company (AGFCTC) is a California company authorized to issue Thrift Investment Certificates (TIC's). It is not authorized to issue Certificates of Deposit. AGFCTC provided its investment rates to various publications, including one entitled "100 Highest Yields." AGFCTC's rates were then published in "100 Highest Yields." Plaintiffs saw AGFCTC's rates in "100 Highest Yields" and contacted AGFCTC to confirm the rates. On December 18, 1990, Plaintiffs sent a memorandum confirming their desire to purchase a 5 year CD and a check for a $50,000.00. On December 20, 1990, AGFCTC deposited the check in its account, and on December 24, 1990, the check was paid. On January 3, 1991, AGFCTC mailed a safekeeping receipt for a $50,000.00 deposit, a disclosure for full paid certificate, and a signature card to Plaintiffs. On January 16, 1991, Plaintiffs returned the signed signature card and an acknowledgement of receipt of the disclosure card to AGFCTC. On November 26, 1991 AGFCTC informed Plaintiffs of its intention to cancel the deposit

account effective December 31, 1991.[1] Subsequently, AGFCTC returned to the Marvels $50,000.00 plus accrued interest in the amount of $4,584.29. The factual basis for Plaintiffs' claim is that AGFCTC sold them a TIC when they believed they were purchasing a CD.

Plaintiffs' Second Claim For Relief

Plaintiffs second claim for relief is for breach of contract. Plaintiffs claim that they offered to purchase a 5 year CD, that their offer was memorialized by the memorandum mailed on December 18, 1990 and that AGFCTC accepted that offer by endorsing and depositing the Marvels' check. Plaintiffs claim that AGFCTC breached that contract when it mailed a 5 year TIC rather than a 5 year CD. AGFCTC argues that there is no breach of contract because the oral contract and confirming memo was superseded by the TIC, the signature card, and the disclosure receipt acknowledgement, none of which mentioned a CD. The report of the Magistrate denies AGFCTC's motion for summary judgment on this claim, finding that "genuine issues of material fact exist as to the terms of the contract." The Magistrate also found that "the TIC and the signature card-- are not documents forming the contractual relationship between the parties" and that "no written contract exists between the parties." AGFCTC objects to this finding because Plaintiffs have admitted that they executed the signature card after the oral agreement and that under Oklahoma law, the

[1] A TIC contains a redemption provision that allows it to be redeemed or canceled on thirty days notice. Plaintiffs argue that a CD does not contain a redemption provision.

written contract should prevail. AGFCTC objects to the denial of the motion for summary judgment on this claim and in the alternative objects to the finding that no written contract exists between the parties.

The Court is persuaded that summary judgment is not appropriate in this instance and that the present facts are distinguishable from those in Silk v. Phillips Petroleum Company, 706 P.2d 174 (Okla. 1988). In Silk plaintiff signed "a printed oil and gas lease form, a typewritten option to renew clause, and a printed rental division order." She alleged that she was tricked into not reading a clause supposedly taped onto the printed form. She argued that the conversation prior to the signing of the contract should control. In the present case, Plaintiffs signed documents only after Defendants had received a memo regarding the purchase of a CD and a check for $50,000.00, and had deposited the check. A question of fact exists as to the terms of the agreement between the parties and to the intent of the parties in depositing the $50,000.00 check and in executing the signature card. While it is clear that the signature card and TIC do not constitute the entire agreement between the parties, the Court does not hold, as a matter of law, that the terms of the signature card and the TIC did not become part of the agreement between the parties upon the execution of the signature card. AGFCTC's objection, as to the factual finding that "there is no written contract between the parties" is granted, in that a question of fact exists as to the terms of the contract.

Plaintiffs' Sixth and Seventh Claims For Relief

AGFCTC moved for summary judgment on Plaintiffs' sixth and seventh claims for relief under the Lanham Act, 15 U.S.C. §1125 et seq. asserting that plaintiffs, as consumers, lacked standing to bring these claims. The Magistrate rejected this argument. However, relying on Shonac Corp. v. AMKO International, 763 F.Supp. 919, 929 (S.D. Ohio 1991), the Magistrate recommended summary judgment on these claims, finding that some form of competition is required to invoke standing under the Lanham Act. Plaintiffs objected to this recommendation.

Section 43 of the Lanham Act, 15 U.S.C. §1125 provides as follows:

> (a)(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which--
>
> (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
>
> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
>
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

The purpose of the Lanham Act is set forth at 15 U.S.C. §1127:

> The intent of this chapter is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce;

> to protect registered marks used in such commerce from interference by State, or territorial legislation; to protect persons engaged in such commerce against unfair competition; to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks; and to provide rights and remedies stipulated by treaties and conventions respecting trade-marks, trade names, and unfair competition entered into between the United States and foreign nations.

Because §1127 states that the intent of the statute is to "protect persons engaged in such commerce against unfair competition,"[2] several courts have held that only competitors have standing to sue under the Lanham Act. In Halicki v. United Artists Communications, Inc., 812 F.2d 1213 (9th Cir. 1987), the court construed §1127 to require that a plaintiff be a competitor in order to have standing under the Lanham Act. That court stated:

> The final section of the Lanham Act--in a passage unusual and extraordinarily helpful, in declaring in so many words the intent of Congress--states that 'the intent of this chapter is to regulate commerce within the control of Congress...to protect persons engaged in such commerce against unfair competition.' We quote the operative language. The rest of the declaration of intent relates to the use of trademarks and is not relevant here. The statute is directed against unfair competition. To be actionable, conduct must not only be unfair but must in some discernible way be competitive....
>
> If section 43(a) is not confined to injury to a competitor, in the case of a false designation, it becomes a federal statute creating the tort of misrepresentation, actionable as to any goods or services in commerce affected by the misrepresentation.

Similarly, the court, in Shonac held that the purpose of §43(a) was to "protect persons engaged in ... commerce against unfair

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[2] Although §1127 sets forth other purposes of the act, only the purpose "to protect persons engaged in such commerce against unfair competition" is applicable in the present case since the other stated purposes relate to the use of trademarks.

competition," and therefore it applied only to competitive conduct. Id., 763 F.Supp. at 933-934.

Plaintiffs argue that the application of §1127 to the interpretation of §1125 is incorrect under the rules of statutory construction. Plaintiffs, relying on FTC v. Mandel Brothers, Inc., 358 U.S. 385 (1959), argue that the purpose of the act does not limit the text of the act, but is merely a useful aid in resolving ambiguity.[3] Plaintiffs assert that the plain meaning of §1125(a) allows "any person" to sue under the act. Plaintiffs also argue that §1127 states that the purpose of the act is to protect persons "engaged in commerce," and that a person does not have to be a competitor to be engaged in commerce.

"In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of a 'clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" Wilson v. Al McCord Inc., 858 F.2d 1469,1477 (10th Cir. 1988); Colorado High School Activities Association v. National Football League, 711 F.2d 943,945 (10th Cir. 1983)(quoting United States v. Turkette, 452 U.S. 576, 580, 101 S.Ct.2524, 2527, 69 L.Ed.2d 246 (1981)). In statutory construction, unless otherwise defined, words will be given their "ordinary, contemporary, common meaning." CBC, Inc. v.

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[3] Plaintiffs misread Mandel Brothers. That case holds that the title of an act does not limit the plain meaning of the text, but can be a useful aid in resolving an ambiguity. Id. at 388-389. Mandel is not helpful here because we are not dealing with the title of the statute, but rather with the specific purpose of the statute as set forth in the text of the statute itself.

Board of Governors of Federal Reserve System, 855 F.2d 688, 690 (10th Cir. 1988)(quoting Perrin v. United States, 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed.2d 199 (1979)). The plain meaning is determinative unless there is "a clearly expressed legislative intent to the contrary." Id. at 691; Consumer Product Safety Commission v. GTE Sylvania, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980).

Thus, in determining whether Plaintiffs have standing to sue under the Lanham Act, this court must consider both the plain meaning of the statute as well as the clearly expressed legislative intent. Considering both of these factors, the Court holds that a claim under the Lanham Act must be brought by a competitor of the alleged wrongdoer. The clear intent of Congress expressed in §1127 supports this conclusion. Moreover, § 1127 cannot be interpreted in any way that does not require competition as Plaintiffs suggest. "If Congress had intended §43(a) to apply to noncompetitive conduct, it would have stated that the purpose of the statute was to protect persons engaged in commerce from unfair trade or unfair business practices." Shonac, 763 F.Supp. at 934. The Report and Recommendation of the Magistrate recommending summary judgment on Plaintiffs' sixth and seventh claims for relief is hereby adopted and affirmed.

In summary, Plaintiffs' objections to the Report and Recommendations of the Magistrate are overruled. AGFCTC's motion for summary judgment is denied as to Plaintiffs' first (fraud, deceit, and concealment) and second (breach of contract) claims for

relief, and granted as to Plaintiffs' fourth (fraud, connivance, deceit and concealment), sixth (Lanham Act-Oklahoma Class), and seventh (Lanham Act-National Class) claims for relief. AGFCTC's partial objection to the Report and Recommendations of the Magistrate on the second (breach of contract) claim is granted in that a question of fact exists as to the terms of the contract between the parties.

IT IS SO ORDERED THIS 8th DAY OF DECEMBER, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ADRIEL C. L. SIMPSON, by Karen L. Simpson, Guardian ad Litem,

Plaintiff,

vs.

STANLEY GLANZ, et al.,

Defendants.

No. 92-C-974-C

ORDER

Before the Court are Defendants' motions to dismiss, and in the alternative for summary judgment, Plaintiff's response, Plaintiff's motion to stay all proceedings pending ruling on his direct appeal, and Defendants' objection.

I. BACKGROUND

In October 1992, Plaintiff brought this civil rights action against forty employees of the Tulsa County Jail, including the Sheriff, the jail doctor, numerous deputies and nurses. Plaintiff alleged that Defendants violated his First, Fifth, Eighth, and Fourteenth Amendment rights, while he was a juvenile pretrial detainee at the Tulsa County Jail from August 1990 through June 1992. Plaintiff's allegations are summarized as follows:

> **Alleged Denial of First Amendment Rights:** Defendants deprived Plaintiff of his Bible and religious material; harassed and threatened him regarding his religious practice of keeping the sabbath, and denied him a "no-pork diet."
>
> **Alleged Denial of Fifth Amendment Rights:** Defendants ordered or actively participated in the confiscation of his personal property and edible commissary items during

shake-down.

Alleged Denial of Eighth And Fourteenth Amendment Rights: Defendants verbally harassed, threatened, physical assaulted, and sexually molested plaintiff; denied him proper medical care for his broken toes, spider bite, and vomit; failed to properly administer his vitamins and medications; denied him outside medical care; subjected him to inhumane living conditions (regarding insects; plumbing; lack of hot water, clean clothing, and bed linens); moved him around and forced him to sleep on filthy floors without a cot or mattress; refused to let him use the bathroom during a shake-down when he had diarrhea; placed spit, hair, cigarette ashes, and foreign particles in his food; denied him phone privileges; called his mother a "Black Bitch;" allowed him to visit for less than seven minutes while other juveniles were allowed to visit for extended periods of time; forced him to strip naked on December 10, 1990, while a female deputy video-taped him; left him for 56 hours without clothing, bedding, cover, or personal care items; and was seen naked by two female deputies on December 10, 1990.

Plaintiff alleged Stanley Glanz and Bill Thompson were responsible for the actions of their subordinates and failed to prevent inhumane conditions of his confinement. Plaintiff sought damages, a thorough investigation of the Tulsa County Sheriff's Department, and termination of Defendants' employment.

In April 1993, Defendants moved to dismiss and in the alternative for summary judgment on the basis of the Special Report. In May 1993, Plaintiff filed a response, asserting the Report contained inadequate documentation to absolve any of the Defendants of the alleged civil rights violations; the documents and statements were "inconsistent, inaccurate, erroneous, and reprehensible"; Dr. Stripling's denial for outside medical treatment was "ridiculous;" and Plaintiff had never eaten any meat except for chicken at the facility where he was presently incarcerated. In his affidavit, Plaintiff merely attested that

Defendants violated his civil rights, that Glanz should be held responsible for the actions of his employees, and that the Tulsa County Jail should provide adequate accommodation for juveniles.

II. SUMMARY JUDGMENT STANDARDS

The court must grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). When reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party. Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990). "However, the nonmoving party may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." Id. Conclusory allegations are insufficient to establish a genuine issue of fact. McKibben v. Chubb, 840 F.2d 1525, 1528 (10th Cir. 1988). Nor does the existence of an alleged factual dispute defeat an otherwise properly supported motion for summary judgement. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).

The court may treat the Martinez report as an affidavit in support of the motion for summary judgment, but may not accept the factual findings of the report if the prisoner has presented conflicting evidence. See Hall v. Bellmon, 935 F.2d 1106, 1111

(10th Cir. 1991). This process aids the court in determining possible legal bases for relief for unartfully drawn pro se prisoner complaints, and not to resolve material factual issues. Id. at 1109. The court must also construe the Plaintiff's pro se pleadings liberally. Haines v. Kerner, 404 U.S. 519, 520 (1972).

DISCUSSION

In considering Defendants' motions for summary judgment, the Court has examined the Report prepared by Tony Boutwell of the Tulsa County Sheriff's Department. Although Plaintiff has responded to the motions, he has presented no evidence to refute the facts in Defendants' motions and Report. Plaintiff's response and affidavit merely contain conclusory allegations that the Report is inadequate and erroneous, and do not controvert Defendants' summary judgment evidence. Therefore, because Plaintiff has not presented conflicting evidence, the Court accepts the factual findings of the Report. See Hall, 935 F.2d at 1111.

After viewing the summary judgment evidence in the light most favorable to the Plaintiff, the Court concludes that Plaintiff has not come forward with any evidence to show that there remain any genuine issues of material fact. Plaintiff cannot defeat Defendants' well-supported motion without offering any controverting affidavits or evidence from which a reasonable jury could return a verdict in his favor. See Anderson, 477 U.S. at 249-52. Any reliance on the allegations in his pleadings is insufficient to raise a genuine issue of material fact. See Green

v. St. Louis Housing Authority, 911 F.2d 65, 68 (8th Cir. 1990).

A. First Amendment

A prisoner's right to exercise his religion is not absolute. The First Amendment requires that an inmate be accorded a reasonable opportunity to pursue his religion. Mosier v. Maynard, 937 F.2d 1521, 1525 (10th Cir. 1991). "However, what constitutes a reasonable opportunity must be evaluated with reference to legitimate penological objectives of the prison. . . ." Id. An infringement of a constitutional right is valid in prison if it is "reasonably related to legitimate penological objectives." Id.

The Court concludes that Plaintiff had a reasonable opportunity to pursue his religion at the Tulsa County Jail. Defendants have denied Plaintiff's allegations that he was deprived of his Bible, and that he was threatened regarding his religious practice of observing the Sabbath. The Report reveals that Plaintiff had a Bible on his property record; that on one occasion Sgt. Edge found Plaintiff's Bible in the control room and returned it to him; that Denise Corley allowed Plaintiff to have a set of Bible quiz card; and that on November 17, 1990, Plaintiff signed a property release form releasing one Bible and some letters to his mother, Karen Simpson. Although Sgt. Edge asked Plaintiff to clean his dirty cell one Saturday, he never ordered Plaintiff to do it because Plaintiff immediately informed him that Saturday was his sabbath.

Regarding Plaintiff's pork-free diet, the Court concludes

Plaintiff had a reasonable opportunity to eat pork-free food. The Report discloses that Plaintiff received pork-free food at all meals except for bacon at breakfast, and that Plaintiff hardly ate jail food and lived instead on potato chips and candy bars.

Accordingly, Defendants are entitled to judgment as a matter of law on Plaintiff's First Amendment claims.

B. Fifth Amendment

Defendants are also entitled to summary judgment on Plaintiff's confiscation-of-property claims under the Fifth Amendment because Plaintiff has sued only state and county employees. The Fifth Amendment protects against deprivations of life, liberty, or property by the federal government. Berry v. City of Muskogee, Okla., 900 F.2d 1489, 1492 n.2 (10th Cir. 1990).

Even if the Court construed Plaintiff's claim to allege a negligent or an intentional deprivation of property under the Due Process Clause of the Fourteenth Amendment, Defendants would be entitled to judgment as a matter of law. See Hudson v. Palmer, 468 U.S. 517, 536 (1984). Although a prisoner may not be deprived of property by persons acting under color of state law without due process, Parratt v. Taylor, 451 U.S. 527, 537 (1981), overruled on other grounds, Daniels v. Williams, 474 U.S. 327 (1986), an unauthorized deprivation of property by a state employee is not a due process violation as long as a meaningful post-deprivation remedy is available. Freeman v. Department of Corrections, 949 F.2d 360, 362 (10th Cir. 1991). Due process is violated only if

that post-deprivation procedure is unavailable, unresponsive, or inadequate. Id.

Defendants deny taking and failing to return Plaintiff's property. The Report reveals that if an item is confiscated it is usually returned to the inmate the next day unless it is contraband. The Report further reveals that some of Plaintiff's edible commissary items may have been taken and destroyed on December 10, 1990, for health reason because they were contaminated with fecal and urine material.

In any case, even if Plaintiff's personal property was negligently or intentionally taken and destroyed, the destruction did not violate Plaintiff's due process rights because he had an adequate state post-deprivation remedy under Okla. Stat. tit. 51, § 151-55. See Hudson, 468 U.S. at 533. Accordingly, Defendants are entitled to judgment as a matter of law on Plaintiff's numerous claims of confiscation of property.

C. Eighth and Fourteenth Amendments

The Fourteenth Amendment Due Process Clause, and not the Eighth Amendment Cruel and Unusual Punishment Clause, applies to a pretrial detainee such as the Plaintiff. Bell v. Wolfish, 441 U.S. 520, 535-36 (1979). Accordingly, Defendants are entitled to judgment as a matter of law on Plaintiff's Eighth Amendment claims.

(1) Condition of Confinement

A pretrial detainee's condition of confinement is governed by

the Fourteenth Amendment Due Process Clause. Bell, 441 U.S. at 535. This clause prohibits a pretrial detainee from being subject to conditions which "amount to punishment or otherwise violate the Constitution." Id. at 537.

The Court concludes that Defendants' alleged actions or inactions did not amount to punishment. The Report discloses no direct evidence of food tampering or complaint by the Plaintiff about contaminated food. The Report further discloses that water was shut off when it was necessary to make repairs; that clean clothing and bedding were issued to the inmates at least once each week; that Plaintiff had refused bedding at least on one occasion; that Plaintiff was never left in a cell for fifty-six hours without clothing or bedding; and that no inmate in the Tulsa County Jail is allowed to wear street shoes in the jail, but is issued a sandal type shoe with which he can wear socks. Although the Report does not indicate any cell movement, it indicates that Plaintiff preferred to sleep on the floor and had refused a blanket following the December 10, 1990 shakedown.

Defendants are, thus, entitled to judgment as a matter of law on Plaintiff's conditions-of-confinement claims as well.

(2) Medical Treatment

Under the Fourteenth Amendment Due Process Clause, pretrial detainees are entitled to the same degree of protection regarding medical care as that afforded convicted inmates under the Eighth Amendment. Martin v. Board of County Com'rs of County of Pueblo,

909 F.2d 402, 406 (10th Cir. 1990). Thus, Plaintiff's inadequate medical attention claim must be judged against the "deliberate indifference to serious medical needs" test set out in Estelle v. Gamble, 429 U.S. 97 (1976). See Martin, 909 F.2d at 406.

The Court concludes that Plaintiff has failed to provide anything more than conclusory allegations that his medical conditions were serious. The Report discloses that Dr. Margaret Stripling saw Plaintiff on eight different occasions and responded to each of his medical complaints, including his allegedly broken toe. She prescribed pain medication for the Plaintiff, and the toe had full range of motion within a week. The nurses saw Plaintiff on at least thirty-one different occasions. Plaintiff was treated for diarrhea, insect bites, headaches, a broken toe, nasal congestion, coughing, fever, vomiting, toothaches, stomach aches, blood in the stool, bumps in his mouth, and a cold. Laboratory analysis were performed on five different occasions. On April 3, 1991, Sheriff Glanz personally ordered that Plaintiff be put on sick call because of a fever and cough.

Even if Plaintiffs' conditions were serious, the Court concludes that Defendants were not deliberately indifferent to Plaintiff's conditions. Plaintiff's allegations indicate at the most a disagreement with the treatment received, and not that medical treatment was never rendered to him. See Estelle, 429 U.S. at 106 (difference of opinion in the diagnosis or treatment of a medical condition is insufficient to establish a constitutional violation).

Regarding Plaintiff's allegations that Defendants erred in administering his vitamins and medications, the Court concludes that Plaintiff's allegations amount to negligence at the most. See id. (negligence is not actionable in a section 1983 action). The Report indicates that Plaintiff received proper vitamins and medication and that on five different occasions, he refused to get out of his bunk to take vitamins and medications.

Accordingly, Defendants are entitled to judgment as a matter of law on Plaintiff's claims of denial of medical treatment.

(3) Remaining Allegations

Defendants are entitled to judgment as a matter of law on Plaintiff's numerous allegations of verbal harassment and threats as they do not rise to a constitutional violation. Compare Collins v. Cundy, 603 F.2d 825, 827 (10th Cir. 1979) (allegation that sheriff laughed at prisoner and threatened to hang him was not sufficient to state constitutional deprivation under section 1983), with Northington v. Jackson, 973 F.2d 1518, 1522-24 (10th Cir. 1992) (allegation that police captain put revolver to inmate's head and threatened to kill him stated an excessive force claim under the Eighth Amendment).

Defendants are also entitled to summary judgment in their favor on Plaintiff's remaining allegations that he was forced to strip naked on December 10, 1990, while a female deputy video-taped him; that on one occasion he was allowed to visit for less than seven minutes while other juveniles were allowed to visit for

extended periods of time; that Rick Harrell maliciously prevented Plaintiff from using the bathroom during a shake down inspection; and that Sgt. Patrick called Plaintiff's mother a "black bitch." None of these claims rise to a constitutional violation and in any case they are unsupported. The Report reveals that on December 10, 1990, Plaintiff was ordered along with the other juveniles to take his dirty clothing off as the juveniles had been throwing fecal material and urine at each other. Although Denise Corley videotaped the strip search of Jermle Jordan because he was resisting the search, Plaintiff was not videotaped. The juveniles were then given clean clothing.

While no inmate in the Tulsa County Jail is generally allowed a contact visit except by court order or permission of jail supervisor or shift lieutenant, and in no case longer than twenty minutes, the Report reveals that Plaintiff had received special allowances regarding visitation. For example, on June 16, 1992, he was allowed to visit with his mother and two guests for thirty minutes.

There is no evidence that Rick Harrell maliciously prevented Plaintiff from using the bathroom during a shake down inspection. Harrell had asked Plaintiff to wait a few minutes before he could go to the bathroom. Plaintiff, however, defecated in the corner of the holding cell. There is equally no evidence that Mark Penley sexually molested the Plaintiff, and that Sgt. Patrick called Plaintiff's mother a "black bitch."

D. Supervisory Liability

The Court next considers Plaintiff's allegations that Stanley Glanz and Bill Thompson failed to ensure that all the deputies and detention officers were properly trained. The Tenth Circuit recognizes that "[a] supervisor is not liable under § 1983 unless an affirmative link exists between the constitutional deprivation and . . . his failure to supervise." Meade v. Grubbs, 841 F.2d 1512, 1527 (10th Cir. 1988) (quoted case omitted). "To be liable, a superior must have 'participated or acquiesced in the constitutional deprivations of which the complaint is made.'" Id. at 1528 (quoted case omitted).

Although under Oklahoma law, a sheriff is responsible for the proper management of the county jail and the conduct of his deputies, id., Plaintiff's bare allegations that Glanz had the responsibility to train his deputies and detention officers are insufficient to raise any genuine issues of material fact regarding inadequate supervision and training. Nor has Plaintiff pled that Glanz and Thompson were the policy makers in the Tulsa County Jail, and that they had approved a policy or custom which would amount to a violation of Plaintiff's constitutional rights under the theory of respondeat superior. See City of Oklahoma City v. Tuttle, 471 U.S. 808, 817 (1985); Monnel v. New York City Dept. of Social Services, 436 U.S. 658 (1978). Accordingly, Defendants are entitled to judgment as a matter of law on Plaintiff's claim of supervisory liability.

CONCLUSIONS

After viewing the evidence in the light most favorable to the Plaintiff, the Court concludes that Defendants have made an initial showing negating all disputed material facts, that Plaintiff has failed to controvert Defendants' summary judgment evidence, and that Defendants are entitled to judgement as a matter of law.

ACCORDINGLY, IT IS HEREBY ORDERED, that:

(1) Defendants' motions to dismiss and in the alternative for summary judgment [docket #24 and #30] are **granted.**

(2) Plaintiff's motion to stay all proceedings pending ruling on his direct appeal [docket #35] is **denied.**

SO ORDERED THIS 7th day of December, 1993.

H. DALE COOK, Senior Judge
UNITED STATES DISTRICT COURT

DATE DEC 09 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 07 1993

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

ADRIEL C. L. SIMPSON, by Karen L. Simpson, Guardian ad Litem,

Plaintiff,

vs.

STANLEY GLANZ, et al.,

Defendants.

No. 92-C-974-C

JUDGMENT

In accord with the Order sustaining Defendants' motions for summary judgment, the Court hereby **enters judgment** in favor of all Defendants and against the Plaintiff, Adriel C. L. Simpson. Plaintiff shall take nothing on his claim. **Costs** are assessed against the Plaintiff, if timely applied for under Local Rule 54.1. Each side is to pay its respective **attorney fees.**

SO ORDERED THIS 7th day of Dec., 1993.

H. DALE COOK, Senior Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JERALD G. WILSON,
an individual,

Plaintiff,

vs.

HOLIDAY INNS, INC.,
a Tennessee corporation; and
GREAT SOUTHERN FEDERAL SAVINGS
AND LOAN ASSOCIATION, AND
RESOLUTION TRUST COMPANY AS
RECEIVER/CONSERVATOR FOR
GREAT SOUTHERN FEDERAL SAVINGS
AND LOAN ASSOCIATION,

Defendants.

Case No. 92-C-984-C

JOINT STIPULATED DISMISSAL

COME NOW the Plaintiff, Jerald G. Wilson, and the Defendants, Holiday Inns, Inc. and Resolution Trust Corporation as Receiver for Great Southern Federal Savings and Loan Association, Savannah, Georgia, and do hereby enter their joint stipulated dismissal with prejudice against the Defendants, Holiday Inns, Inc. and Resolution Trust Corporation as Receiver for Great Southern Federal Savings and Loan Association.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FRED MARVEL and ANGELA MARVEL,

Plaintiffs,

vs.

FINANCIAL RATES, INC., AMERICAN GENERAL FINANCIAL CENTER THRIFT COMPANY, and AMERICAN GENERAL FINANCE COMPANY,

Defendants.

Case No. 92-C-206-B

O R D E R

Now before the Court is the objection of Plaintiffs Fred and Angela Marvel (docket # 134) to the Report and Recommendation of the United States Magistrate Judge (docket #129) regarding Defendant American General Finance Inc.'s (AGFI) Motion to Dismiss For Lack Of Personal Jurisdiction, Failure to Timely File and for Failure to State a Cause of Action (docket # 104). The Magistrate Judge recommended that the motion to dismiss for lack of personal jurisdiction, for failure to timely file, and for failure to state a claim as to Plaintiffs' first, second, and eighth claims for relief be denied. No exceptions or objections have been filed as to these rulings, and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the Magistrate as to the motion to dismiss for lack of personal jurisdiction, for failure to timely file, and for failure to state

a claim as to Plaintiffs' first, second, and eighth claims should be and hereby is adopted and affirmed.

The Report and Recommendation also contained a recommendation that the motion to dismiss for failure to state a claim as to Plaintiffs' third, fourth, sixth, and seventh claims for relief be granted. Plaintiffs timely filed an objection to these recommendations.

Statement of the Case

American General Financial Center Thrift Company (AGFCTC) is a California company authorized to issue Thrift Investment Certificates. It is not authorized to issue Certificates of Deposit (CD's). AGFCTC provided its investment rates to various publications, including one entitled "100 Highest Yields." AGFCTC's rates were then published in "100 Highest Yields." Plaintiffs saw AGFCTC's rates in "100 Highest Yields" and contacted AGFCTC to confirm the rates. On December 18, 1990, Plaintiffs sent by overnight delivery a check for $50,000.00 and a memorandum confirming that Plaintiffs wished to purchase a 5-year CD at the quoted rate. On December 20, 1990, AGFCTC deposited the check in its account, and on December 24, 1990, the check was paid. On January 3, 1991, AGFCTC mailed a safekeeping receipt for a $50,000.00 deposit, a disclosure for full paid certificate form, and a signature card to Plaintiffs.[1] On January 16, 1991,

[1] These documents were for a Thrift Investment Certificate (TIC) and not a CD. The TIC contained a redemption provision that allows it to be redeemed or canceled on thirty days notice. Plaintiffs argue that a CD does not contain a redemption provision.

Plaintiffs returned the signed receipt for disclosure and signature card to AGFCTC. On November 26, 1991, AGFCTC informed Plaintiffs of its intention to cancel the deposit account effective December 31, 1991. Subsequently, AGFCTC returned to the Marvels $50,000.00 plus accrued interest in the amount of $4,584.29. The factual basis for Plaintiffs' claim is that AGFCTC sold them a TIC when they believed they were purchasing a CD.

Plaintiffs allege that American General Finance Inc. (AGFI) is the parent of AGFCTC, that the actions of AGFCTC are imputed in law to AGFI, that AGFCTC is the alter ego of AGFI, and that AGFI planned, directed, authorized, participated in, or ratified the acts of AGFCTC.

Plaintiffs' Third Claim For Relief

The Magistrate Judge recommended that Plaintiffs' third claim, for "tortious breach of contract" be dismissed because the Oklahoma Supreme Court had refused to extend the concept of tortious breach of contract to commercial contracts other than insurance contracts. Rodgers v. Tecumseh Bank, 756 P.2d 1223 (Okla. 1988). Plaintiffs objected to this recommendation because "the decision in Rodgers v. Tecumseh Bank is not a case in point with the allegations of Plaintiffs as to Cause Three of the First Amended Complaint."

The Court is persuaded that Rodgers precludes Plaintiffs' third claim. In Rodgers, the court refused to extend the concept of tortious breach of contract (breach of the implied duty of good faith and fair dealing) to commercial contracts other than insurance contracts. While Plaintiff provides authority that a

tort may arise in the performance of a contract, Woods Petroleum v. Delhi Gas Pipeline, 700 P.2d 1023, 1027 (Okla. App. 1983), Plaintiffs third cause of action does not plead a tort arising in the performance of the contract, but rather asserts that the breach of the contract itself (failure to provide a CD) constitutes a tort. Rodgers precludes this claim. The Report and Recommendation of the Magistrate recommending dismissal of Plaintiff's third claim for relief is hereby adopted and affirmed.

Plaintiffs' Fourth Claim For Relief

Plaintiffs fourth claim for relief contains allegations that Financial Rates Inc.[2] induced Plaintiffs to purchase a 5-year CD from AGFCTC by creating a false impression that AGFCTC sold a 5-year CD, that AGFCTC confirmed the false impression by accepting and cashing the $50,000.00 check, and that the conduct of AGFCTC and AGFI was wrongful and tortious under Okla.Stat.Ann.tit. 15, §58 and Okla.Stat.Ann.tit.76, §§1-3. The Magistrate recommended dismissal of this claim because it is merely a restatement of Plaintiffs' first claim for fraud. Plaintiffs object to this recommendation "on the ground that an action for connivance, under 12 [sic] OSA Section 58 is stated." A thorough review of Plaintiff's First Amended Complaint leads the Court to conclude that both the factual allegations and the legal theories of claims one and four are identical. Plaintiffs first claim is for fraud

[2] Plaintiffs, on February 5, 1993, filed a Stipulation for dismissal of Causes on Financial Rates, Inc., seeking dismissal of their fourth and fifth causes of action against Financial Rates, Inc.

and deceit and contains allegations that Defendant had a duty to tell Plaintiffs "that it could not issue a 5-year CD, but could only issue a 5-year TIC which could be redeemed or canceled on 30 day notice," that AGFCTC "remained silent, cashed the $50,000.00 check," that the "suppression of the truth,... with the obvious intent to deceive," was to "induce the Plaintiffs" to "enter into the 5-year TIC...." The Report and Recommendation of the Magistrate recommending dismissal of Plaintiffs' fourth claim for relief is hereby adopted and affirmed.

Plaintiffs' Sixth and Seventh Claims For Relief

AGFI moved to dismiss Plaintiffs' sixth and seventh claims for relief under the Lanham Act, 15 U.S.C. §1125 et seq. asserting that the Lanham Act "affords remedies only for commercial plaintiffs..." The Magistrate rejected this argument. However, relying on Shonac Corp. v. AMKO International, 763 F.Supp. 919, 929 (S.D. Ohio 1991), the Magistrate recommended dismissal of these claims, finding that some form of competition is required to invoke standing under the Lanham Act. Plaintiffs objected to this recommendation.

Section 43 of the Lanham Act, 15 U.S.C. §1125 provides as follows:

> (a)(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which--
>
> (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
>
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

The purpose of the Lanham Act is set forth at 15 U.S.C. §1127:

> The intent of this chapter is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to protect registered marks used in such commerce from interference by State, or territorial legislation; to protect persons engaged in such commerce against unfair competition; to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks; and to provide rights and remedies stipulated by treaties and conventions respecting trade-marks, trade names, and unfair competition entered into between the United States and foreign nations.

Because §1127 states that the intent of the statute is to "protect persons engaged in such commerce against unfair competition,"[3] several courts have held that only competitors have standing to sue under the Lanham Act. In Halicki v. United Artists Communications, Inc., 812 F.2d 1213 (9th Cir. 1987), the court construed §1127 to require that a plaintiff be a competitor in order to have standing under the Lanham Act. That court stated:

> The final section of the Lanham Act--in a passage unusual and extraordinarily helpful, in declaring in so many words the intent of Congress--states that 'the intent of this chapter is to regulate commerce within the control of Congress...to protect persons engaged in such commerce against unfair competition.' We quote the operative

[3] Although §1127 sets forth other purposes of the act, only the purpose "to protect persons engaged in such commerce against unfair competition" is applicable in the present case since the other stated purposes relate to the use of trademarks.

> language. The rest of the declaration of intent relates to the use of trademarks and is not relevant here. The statute is directed against unfair competition. To be actionable, conduct must not only be unfair but must in some discernible way be competitive....
>
> If section 43(a) is not confined to injury to a competitor, in the case of a false designation, it becomes a federal statute creating the tort of misrepresentation, actionable as to any goods or services in commerce affected by the misrepresentation.

Similarly, the court, in Shonac held that the purpose of §43(a) was to "protect persons engaged in ... commerce against unfair competition," and therefore it applied only to competitive conduct. Id., 763 F.Supp. at 933-934.

Plaintiffs argue that the application of §1127 to the interpretation of §1125 is incorrect under the rules of statutory construction. Plaintiffs, relying on FTC v. Mandel Brothers, Inc., 358 U.S. 385 (1959), argue that the purpose of the act does not limit the text of the act, but is merely a useful aid in resolving ambiguity.[4] Plaintiffs assert that the plain meaning of §1125(a) allows "any person" to sue under the act. Plaintiffs also argue that §1127 states that the purpose of the act is to protect persons "engaged in commerce," and that a person does not have to be a competitor to be engaged in commerce.

"In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of a 'clearly expressed legislative intent to the contrary, that

---

[4] Plaintiffs misread Mandel Brothers. That case holds that the title of an act does not limit the plain meaning of the text, but can be a useful aid in resolving an ambiguity. Id. at 388-389. Mandel is not helpful here because we are not dealing with the title of the statute, but rather with the specific purpose of the statute as set forth in the text of the statute itself.

language must ordinarily be regarded as conclusive.'" Wilson v. Al McCord Inc., 858 F.2d 1469,1477 (10th Cir. 1988); Colorado High School Activities Association v. National Football League, 711 F.2d 943,945 (10th Cir. 1983)(quoting United States v. Turkette, 452 U.S. 576, 580, 101 S.Ct.2524, 2527, 69 L.Ed.2d 246 (1981)). In statutory construction, unless otherwise defined, words will be given their "ordinary, contemporary, common meaning." CBC, Inc. v. Board of Governors of Federal Reserve System, 855 F.2d 688, 690 (10th Cir. 1988)(quoting Perrin v. United States, 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed.2d 199 (1979)). The plain meaning is determinative unless there is "a clearly expressed legislative intent to the contrary." Id. at 691; Consumer Product Safety Commission v. GTE Sylvania, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980).

Thus, in determining whether Plaintiffs have standing to sue under the Lanham Act, this court must consider both the plain meaning of the statute as well as the clearly expressed legislative intent. Considering both of these factors, the Court holds that a claim under the Lanham Act must be brought by a competitor of the alleged wrongdoer. The clear intent of Congress expressed in §1127 supports this conclusion. Moreover, § 1127 cannot be interpreted in any way that does not require competition as Plaintiffs suggest. "If Congress had intended §43(a) to apply to noncompetitive conduct, it would have stated that the purpose of the statute was to protect persons engaged in commerce from unfair trade or unfair business practices." Shonac, 763 F.Supp. at 934. The Report and

Recommendation of the Magistrate recommending dismissal of Plaintiffs' sixth and seventh claims for relief is hereby adopted and affirmed.

In summary, Plaintiffs' objections to the Report and Recommendations of the Magistrate are overruled. AGFI's motion to dismiss for failure to timely file application to amend complaint, and for lack of personal jurisdiction is denied. AGFI's motion to dismiss for failure to state a claim is denied as to Plaintiffs' first (fraud,deceit, and concealment), second (breach of contract), and eighth (equitable trust fund) claims for relief, and granted as to Plaintiffs' third (tortious breach of contract), fourth (fraud, connivance, deceit and concealment), sixth (Lanham Act-Oklahoma Class), and seventh (Lanham Act-National Class) claims for relief.

IT IS SO ORDERED THIS 8th DAY OF DECEMBER, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM REUTER, Plaintiff, vs. TRANSPORT WORKERS UNION OF AMERICA, AMERICAN AIRLINES, INC., a corporation, CONNECTICUT GENERAL LIFE INSURANCE COMPANY, a corporation, Defendants.	)	Case No. 93-C-245

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Fed. Rule Civ. Pro. 41(a)(1)(ii), the parties in this cause stipulate, through the signatures of their respective counsel below, that Plaintiff William Reuter, hereby dismisses, WITH PREJUDICE TO REFILING, his claims in this cause, and this action, and that the parties will pay their respective fees and costs.

Respectfully submitted,

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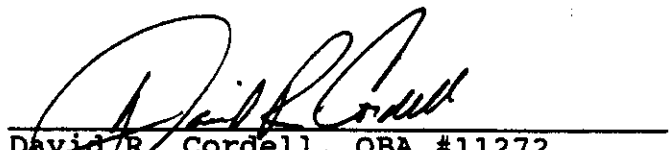
ATTORNEYS FOR PLAINTIFF,
WILLIAM REUTER

and



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**ATTORNEYS FOR DEFENDANTS
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and
CONNECTICUT GENERAL LIFE INSURANCE
COMPANY**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ATLANTIC RICHFIELD COMPANY, Plaintiff,	)	
-vs-	)	Consolidated Cases Nos.
AMERICAN AIRLINES, INC. et al, Defendants.	)	89-C-868-B ~~89-C-869-B~~ 90-C-859-B

DEFAULT JUDGMENT AND ORDER

Now on this 7th day of December, 1993, this matter comes on for consideration of Plaintiff Atlantic Richfield Company's ("ARCO") MOTION FOR DEFAULT JUDGMENT (docket no. 1208) filed herein on December 6, 1993. The Court, being fully advised and informed in the premises, FINDS, ADJUDGES, ORDERS and DECREES:

I.

Default Judgment is hereby entered against the Defendant Great Lakes Container Corporation.

II.

This Default Judgment holds and provides as follows:

1. The Defendant Great Lakes Container Corporation is barred from asserting any defenses to Plaintiff's allegations; and

2. The Defendant Great Lakes Container Corporation is liable for all necessary response costs thus far incurred and which will in the future be incurred by ARCO which are consistent with the National Contingency Plan (NCP), 40 C.F.R. Part 300; and

3. The Defendant Great Lakes Container Corporation is liable under CERCLA to provide contribution to ARCO for response costs ARCO has expended or incurred or may in the future expend or incur; and

4. The Defendant Great Lakes Container Corporation shall reimburse ARCO for all or part of the response costs incurred by ARCO to date, and all or part of the response costs ARCO may incur in the future consistent with the NCP; and

5. The Defendant Great Lakes Container Corporation shall reimburse ARCO by way of either indemnity or contribution, for all or part of the costs ARCO has expended or incurred or which it may in the future expend or incur.

III.

The amounts of the actual judgments and the portion of any joint and several judgment to be paid by Great Lakes Container Corporation shall be deferred until trial.

Dated: December 7th, 1993

THOMAS R. BRETT
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MID-AMERICAN INDEMNITY INSURANCE COMPANY,

Plaintiff,

vs.

A.J.W. ENTERPRISES, INC., d/b/a BRONCO'S and ANGELA SPENCER,

Defendants.

Case No. 93-C-115-B

O R D E R

On October 4, 1993, the Court entered its Order directing the parties to file briefs within twenty days from such date on the following issues:

(1) That apparent service was made upon AJW Enterprises, Inc. (AJW) by personally serving its service agent Alvin J. Walkner on July 7, 1993. However, Plaintiff's Complaint alleges AJW was suspended effective December 14, 1992 for non-payment of the franchise tax pursuant to 68 O.S. §1212. An issue may exist as to the validity of service upon AJW.

(2) That the affidavit offered by Plaintiff's counsel to support the entry of default judgment against AJW has not been notarized making same an unsworn statement. An issue may exist as to this matter.

The Court notes the parties have stipulated to the dismissal of Angela Spencer, leaving only the putative defendant AJW.

In view of the above the Court concludes this matter should be

and the same is hereby DISMISSED without prejudice, for failure to prosecute.

IT IS SO ORDERED, this 7 day of December, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ATLANTIC RICHFIELD CO.,

Plaintiff,

vs.

AMERICAN AIRLINES, INC., et al.,

Defendants.

AND CONSOLIDATED ACTIONS

Case No.'s 89-C-868-B
89-C-869-B
90-C-859-B
(Consolidated)

AMENDED

ORDER AND JUDGMENT GRANTING THE MOTION FOR GOOD FAITH DETERMINATION AND ENTRY OF CONTRIBUTION BAR ON GROUP 3 SETTLEMENT

NOW on this 6th day of December, 1993, this matter comes on for consideration of the Group 3 Defendants' (Glenn E. Wynn, Vacuum and Pressure Tank Truck Services, Inc. and Vacuum Refining Company) "MOTION FOR DETERMINATION OF GOOD FAITH DETERMINATION AND ENTRY OF CONTRIBUTION BAR ON GROUP 3 SETTLEMENT," (Docket No. 1193). The Plaintiff ARCO appears by its attorney, Larry Gutterridge, and the Defendants appear by their respective lead counsel. The Court having examined the files and records and proceedings herein, having reviewed and considered the terms and conditions of the settlements in question, and being fully advised and informed in the premises FINDS, ORDERS AND ADJUDGES as follows:

1. The Settlement between ARCO and Group 3 Defendants is found to be in good faith, reasonable, fair and consistent with the purposes that CERCLA is intended to serve, such that the Pro Tanto Rule previously adopted in this case shall apply.

220

2. One significant factor in approving the settlement with Group 3 is Group 3's lack of funds or net worth to contribute to a settlement. Group 3 and their insurance carriers have had an ongoing coverage dispute, not yet resolved. The Court concludes that Group 3's culpability in contributing to the Glenn Wynn site's contamination considerably exceeds the $300,000.00 sum, but the evidence indicates Group III's ability to pay is limited.

3. ARCO's recovery against any other parties at the Site (including litigation attorneys fees if determined recoverable on appeal) is reduced by the amount of the settlement according to the *pro tanto* rule, as expressed in the Report and Recommendation of U.S. Magistrate Judge, filed March 3, 1993 (Docket No. 642).

4. Each and every claim, counterclaim and cross-claim (including the "deemed filed" claims) by ARCO or any other party against the Group 3 Defendants and/or by the Group 3 Defendants against ARCO or any other party is hereby dismissed, such claims to be dismissed in their entirety on the merits, with prejudice and without costs, and with prejudice as to any future action upon such claims raised or which could have been raised in this proceeding, except as set forth in the settlement.

5. ARCO and the Group 3 Defendants shall bear and be responsible for its own expenses, attorneys' fees and legal costs incurred herein. The Group 3 Settlement amount of $300,000.00 includes its share of any recovery ARCO may later obtain for its litigation related attorneys fees if such fees are determined to be recoverable on appeal.

6. All claims against the Group 3 Defendants for costs incurred by any other party in performing the actions set forth in the September, 1987 ROD, for the Source Control Operable Unit, and the June, 1988 ROD, for the Main Site Operable Unit, and for any costs

incurred before the effective date of this Agreement under the contribution and indemnity provisions of Oklahoma law, and under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), the Resource Conservation and Recovery Act ("RCRA") and all other state and federal laws, including, but not limited to, any and all claims for recovery of response costs based upon theories of contract, negligence or any other theory, are barred.

7. Relative to any sums received by ARCO in excess of the ROD I § 107 and § 113 costs and expenses for which ARCO is not ultimately adjudged to be responsible, the Court will determine disposition of said sums following trial on the merits which is set to commence December 7, 1993.

8. The findings and conclusions entered in the form of a Partial Summary Judgment against Glenn E. Wynn and Vacuum and Pressure Tank Truck Services, Inc. (Docket No.'s 1084 and 1086) are incorporated herein by reference and shall remain in full force and effect, except as released by the Settlement Agreement.

9. This Order and Judgment shall be a Rule 54(b) judgment, being a final judgment as to the Group 3 Defendants which resolves all claims against the Group 3 Defendants which were raised or could have been raised in this case, with the express determination by the Trial Court that there is no just reason for delay and the express direction by the Trial Court for entry of final judgment.

10. There being no just reason to delay entry of Judgment, this Court should and does hereby enter a final Judgment and Order of Dismissal as to Defendants Glenn E. Wynn, Vacuum and Pressure Tank Truck Service, Inc. and Vacuum Refining Company, dismissing all claims

against said Defendants, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

IT IS SO ORDERED THIS 7 DAY OF DECEMBER, 1993.

THOMAS R. BRETT
U.S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

553-1.488/jswp

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERT A. BUCKTROT, JR. aka ROBERT BUCKTROT, JR.; LINDA L. BARNETT aka LINDA BARNETT; COUNTY TREASURER, Creek County, Oklahoma; and BOARD OF COUNTY COMMISSIONERS, Creek County, Oklahoma,

Defendants.

FILED

DEC - 6 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 93-C-333-B

O R D E R

Upon the Motion of the United States of America, acting through the Farmers Home Administration, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

Dated this 6th day of Dec., 1993.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

PETER BERNHARDT, OBA #741
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE PARTIES IMMEDIATELY UPON RECEIPT.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MICHAEL D. HARREL,

Plaintiff,

vs.

MUTUAL OF OMAHA INSURANCE COMPANY,

Defendant.

No. 93-C-154-E

ADMINISTRATIVE CLOSING ORDER

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 7th day of December, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

35

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RICHARD UEL COOPER, Plaintiff, vs. MIDWEST MUTUAL INSURANCE COMPANY, an Iowa Corporation, and NATION-WIDE MUTUAL INSURANCE COMPANY, an Ohio Corporation, Defendants.	)	No. 93-C-0234-E

STIPULATION OF DISMISSAL WITH PREJUDICE AND PROTECTIVE ORDER

Plaintiff, Richard Uel Cooper ("Cooper") and Defendant Midwest Mutual Insurance Company ("Midwest") (hereinafter collectively referred to as the "Parties"), pursuant to Fed. R. Civ. P. 41(a)(1)(ii) hereby stipulate as follows:

1. Defendant Nationwide Mutual Insurance Company was dismissed from this litigation by that certain Stipulation for Dismissal filed with this Court on October 19, 1993.

2. The Parties hereby dismiss this litigation against Midwest in its entirety, including any and all claims and causes of action asserted or which could have been asserted by any party herein, with prejudice as to its refiling.

3. Unless prior written consent to disclosure has been obtained from the other party, neither of the Parties, their counsel, agents, employees or representatives shall disclose the settlement amount of Cooper's contract action against Midwest for

uninsured motorist policy benefits. This Confidentiality Stipulation and Protective Order shall survive the termination of this litigation and thereafter continue in full force and effect.

So ordered this 30th day of November, 1993.

S/ JAMES O. ELLISON

The Honorable James O. Ellison
Judge of the United States District Court
for the Northern District of Oklahoma

AGREED TO AND ACCEPTED:

Stuart D. Campbell (OBA #11246)
Ronald W. Little (OBA #15291)
HUFFMAN ARRINGTON KIHLE GABERINO & DUNN
A Professional Corporation
100 West Fifth Street
Suite 1000
Tulsa, Oklahoma 74103-4219
918-585-8141

David M. Garrett
Tami D. Mickelson
436 Court
P. O. Box 2969
Muskogee, Oklahoma 74401

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARY BETH CLINTON,)
)
Plaintiff,)
)
vs.) Case No. 93-C-791-B
)
TRANSPORTATION INSURANCE CO.,)
)
Defendant.)

O R D E R

Now before the Court for its consideration is Defendant Transportation Insurance Co.'s (Transportation Insurance) Motion to Dismiss for Failure to State a Claim upon which Relief may be Granted (Docket #2).

I. Statement of Facts

Plaintiff Mary Beth Clinton (Clinton) alleges in her complaint (Docket #1) that she was injured on March 13, 1993, during the course of her employment at Regis Salon. Plaintiff further alleges that Defendant caused to be issued a Workers' Compensation Insurance Policy to her employer on or before March 13, 1993. According to her complaint, Plaintiff instituted a claim in the Oklahoma Workers' Compensation Court on March 18, 1993. Plaintiff filed the above-styled action September 2, 1993, alleging that Defendant Transportation Insurance "unreasonably, intentionally and in bad faith withheld payment of Workers' Compensation temporary total disability benefits and unreasonably, intentionally and in bad faith withheld authorization for the Plaintiff to obtain medical treatment." (Complaint, p.2).

II. Standard of Fed.R.Civ.P. 12(b) Motion to Dismiss

To dismiss a complaint and action for failure to state a claim upon which relief can be granted it must appear beyond doubt that Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41 (1957). Motions to Dismiss under Fed.R.Civ.P. 12(b) admit all well-pleaded facts. Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969), cert. denied, 397 U.S. 991 (1970). The allegations of the Complaint must be taken as true and all reasonable inferences from them must be indulged in favor of complainant. Olpin v. Ideal National Ins. Co., 419 F.2d 1250 (10th Cir. 1969), cert. denied, 397 U.S. 1074 (1970).

III. Legal Analysis and Conclusion

Plaintiff seeks to bring an action, as a third party beneficiary of the worker's compensation insurance contract issued by the Defendant to her employer, for bad faith failure to honor an insurance contract. Oklahoma has recognized an intentional tort based on insurer bad faith. Christian v. American Home Assurance Company, 577 P.2d 899, 904 (Okla. 1978). The Oklahoma Supreme Court recently addressed for the first time the issue of whether a workers' compensation insurance company could be subjected to a claim for bad faith refusal to pay an employee's workers compensation award. Goodwin v. Old Republic Insurance Company, 828 P.2d 431 (Okla. 1992).

Although the Oklahoma Supreme Court recognized it was addressing an issue of first impression, it stopped short of

providing a definite answer. Id. The Court noted that an "insurer's implied-in-law duty of good faith and fair dealing extends to all types of insurance companies and insurance policies" and concluded that a bad faith tort action against an employer's insurance company would not fall within the exclusive purview of the Workers' Compensation Court. Id. at pp. 432-435. However, the Court's analysis did not go so far as to affirmatively state that an employee could bring a bad faith claim against a workers' compensation insurance company. Instead, the Court stated:

> We assume that a workers' compensation insurance company may be subjected to liability in tort for a wilful, malicious and bad faith refusal to pay an employee's worker's compensation award, and we hold that the facts of this case do not support an action for bad faith.

In Goodwin, the Plaintiff alleged that the worker's compensation insurance carrier had in bad faith failed to pay the amount awarded by the Workers' Compensation Court in a timely fashion. In the instant case, the Plaintiff's Complaint simply states that she filed a claim in Worker's Compensation Court on March 18, 1993, and that the Defendant has in bad faith withheld payment of benefits and withheld authorization for medical treatment. Plaintiff does not contend that she has received an award from the Worker's Compensation Court.

The Goodwin Court clearly resolved the specific issue in the instant case when it held:

> A bad faith claim is separate and apart from the work relationship, and <u>it arises against an insurer only after there has been an award against the employer</u>.

Id. at p. 434 (emphasis added).

Plaintiff's Complaint does not allege that there has been "an award" against her employer. Therefore, even "assuming" the Oklahoma Supreme Court recognized in Goodwin a bad faith tort claim for failure to pay a worker's compensation award, Plaintiff has failed to state a claim because she has not alleged "an award" against her employer by the Worker's Compensation Court.

For the foregoing reason, Defendant's Motion to Dismiss for Failure to State a Claim upon which Relief can be Granted should be and is hereby GRANTED.

IT IS SO ORDERED THIS 2nd DAY OF DECEMBER, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

DATE 12/7/93

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT J. SODEN, a/k/a BOB SODEN, Plaintiff, vs. STATE FARM GENERAL INSURANCE COMPANY and STATE FARM FIRE AND CASUALTY COMPANY, foreign corporations, Defendants, and FIRST GIBRALTAR BANK, F.S.B., Petitioner in Intervention and Third Party Plaintiff, vs. STATE FARM GENERAL INSURANCE COMPANY, a foreign corporation, Third Party Defendant.	)	Case No. 92-C-251-B

O R D E R

Now before the Court is a Stipulation for Order of Dismissal with Prejudice (Docket #70). For good cause shown, the Court concludes that the claims of First Gibraltar Bank and State Farm General Insurance Company should be and are hereby dismissed with prejudice.

IT IS SO ORDERED THIS 6th DAY OF DECEMBER, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JESSIE M. HENDERSON,)
)
Plaintiff,)
)
v.) 93-C-0426-B
)
INDEPENDENT SCHOOL DISTRICT)
NO. 1 of TULSA COUNTY, et al.)
Defendants.)

ORDER

The court is advised that a court-sponsored Settlement Conference was conducted in this case. As a result of the Settlement Conference the parties have agreed to resolve their differences. To facilitate the process the following order is entered, as agreed between the parties:

1. Pending final approval by the Tulsa School Board all proceedings in this case are hereby immediately **stayed.** This means that all pending motions, discovery and any other pending matter shall be stayed without further action by the court or parties.

2. Upon final approval by the Tulsa School Board the case will be administratively closed until such time as all requirements of the agreed-upon settlement are met. At that time the case will be dismissed with prejudice to its refiling. The procedures to be followed are:

   a. Upon approval by the School Board, the parties shall, within five (5) days jointly move to administratively close this case pending

completion of all terms of settlement. The parties shall submit an agreed order for the court's signature to that effect.

b. Upon completion of the terms of settlement the parties shall again, within five (5) days jointly move to dismiss the case, and shall again provide the court with an agreed order to that effect.

c. Administrative closure shall mean that no further action shall be taken in the case, whether in discovery or otherwise.

SO ORDERED THIS 7 day of Dec, 1993.

THOMAS R. BRETT, DISTRICT JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

EUGENE JACKSON,

Plaintiff,

vs.

RON CHAMPION, et al.,

Defendants.

No. 93-C-165-B

FILED

DEC 7 - 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Plaintiff has filed a response to Defendants' motion to dismiss within the time prescribed by the Court. **ACCORDINGLY, IT IS HEREBY ORDERED that** the Clerk shall **reopen** this action and **reinstate** Defendants' motion to dismiss [docket #5].

SO ORDERED THIS 6th day of Dec., 1993.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

M.G. COURY, JR., Individually and M.G. COURY, JR., d/b/a LUXURY CARPET & UPHOLSTERY SERVICES, INC., an Oklahoma Corporation,

Plaintiffs,

vs.

Case No. 93-C-646 B

PAUL SLOAN, Individually and PAUL SLOAN d/b/a LUXURY CARPET CLEANING, INC. and LUXURY CARPET CLEANING, INC., a Corporation,

Defendants.

STIPULATION OF DISMISSAL OF PLAINTIFF'S COMPLAINT AND DEFENDANT'S COUNTER-CLAIM

All Plaintiffs and all Defendants in the above-captioned case, hereby stipulate the Plaintiffs' Petition against the Defendant and the Defendants' counter-claims against the Plaintiffs should be dismissed with prejudice to the bringing of a future action for the same because said claims have been fully settled and compromised.

Dated this 6th day of Dec, 1993.

Richard H. Reno, OBA #10454
3105 E. Skelly Dr., Suite 600
Tulsa, Oklahoma 74105
(918) 743-8598

John K. Harlin, Jr., OBA #3864
810 S. Cincinnati, Suite 400
Tulsa, Oklahoma 74119
(918) 585-3993

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ATLANTIC RICHFIELD COMPANY, Plaintiff,	)	
vs.	)	Case No. 89-C-868-B
	)	~~89-C-869-B~~
AMERICAN AIRLINES, INC., et al.,	)	89-C-859-B
	)	(Consolidated)
Defendants.	)	

ORDER AND JUDGMENT GRANTING THE MOTION FOR GOOD FAITH DETERMINATION AND ENTRY OF CONTRIBUTION BAR ON GROUP 3 SETTLEMENT

NOW on this 6th day of December, 1993, this matter comes on for consideration of the Group 3 Defendants' (Glenn E. Wynn, Vacuum and Pressure Tank Truck Services, Inc. and Vacuum Refining Company) "MOTION FOR DETERMINATION OF GOOD FAITH DETERMINATION AND ENTRY OF CONTRIBUTION BAR ON GROUP 3 SETTLEMENT," (Docket No. 1193). The Plaintiff ARCO appears by its attorney, Larry Gutterridge, and the Defendants appear by their respective lead counsel. The Court having examined the files and records and proceedings herein, having reviewed and considered the terms and conditions of the settlements in question, and being fully advised and informed in the premises FINDS, ORDERS AND ADJUDGES as follows:

1. The Settlement between ARCO and Group 3 Defendants is found to be in good faith, reasonable, fair and consistent with the purposes that CERCLA is intended to serve, such that the Pro Tanto Rule previously adopted in this case shall apply.

2. One significant factor in approving the settlement with Group 3 is Group 3's lack of funds or net worth to contribute to a

settlement. Group 3 and their insurance carriers have had an ongoing coverage dispute, not yet resolved. The Court concludes that Group 3's culpability in contributing to the Glenn Wynn site's contamination considerably exceeds the $300,000.00 sum, but the evidence indicates Group III's ability to pay is limited.

3. ARCO's recovery against any other parties at the Site (including litigation attorneys fees if determined recoverable on appeal) is reduced by the amount of the settlement according to the *pro tanto* rule, as expressed in the Report and Recommendation of U.S. Magistrate Judge, filed March 3, 1993 (Docket No. 642).

4. Each and every claim, counterclaim and cross-claim (including the "deemed filed" claims) by ARCO or any other party against the Group 3 Defendants and/or by the Group 3 Defendants against ARCO or any other party is hereby dismissed, such claims to be dismissed in their entirety on the merits, with prejudice and without costs, and with prejudice as to any future action upon such claims raised or which could have been raised in this proceeding, except as set forth in the Settlement.

5. ARCO and the Group 3 Defendants shall bear and be responsible for its own expenses, attorneys' fees and legal costs incurred herein. The Group 3 Settlement amount of $300,000.00 includes its share of any recovery ARCO may later obtain for its litigation related attorneys fees if such fees are determined to be recoverable on appeal.

6. All claims against the Group 3 Defendants for costs incurred by any other party in performing the actions set forth in

the September, 1987 ROD, for the Source Control Operable Unit, and the June, 1988 ROD, for the Main Site Operable Unit, and for any costs incurred before the effective date of this Agreement under the contribution and indemnity provisions of Oklahoma law, and under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), the Resource Conservation and Recovery Act ("RCRA") and all other state and federal laws, including, but not limited to, any and all claims for recovery of response costs based upon theories of contract, negligence or any other theory, are barred.

7. Relative to any sums received by ARCO in excess of the ROD I §107 and §113 costs and expenses for which ARCO is not ultimately adjudged to be responsible, the Court will determine disposition of said sums following trial on the merits which is set to commence December 7, 1993.

IT IS SO ORDERED, this 6th day of December, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Charles C. Dirickson and Patsy L. Dirickson Plaintiffs, vs. Robert Fain; and Prudential Securities, Inc. Defendants.	)	Case No. 93-C-261E

Notice of Dismissal

Plaintiffs, Charles C. Dirickson and Patsy L. Dirickson, pursuant to Rule 41(a)(1)(i), hereby dismiss this action against Defendants, Robert Fain and Prudential Securities, Inc., without prejudice.

Steven A. Heath, OBA #4036
MYSOCK & CHEVAILLIER
2021 S. Lewis, Suite 700
Tulsa, Oklahoma 74104
(918) 747-6099

ATTORNEY FOR PLAINTIFFS
CHARLES C. DIRICKSON and
PATSY L. DIRICKSON

CERTIFICATE OF MAILING

I hereby certify that on the 6th day of December, 1993, I mailed a true and correct copy of the foregoing instrument by depositing it in the U.S. Mails, proper postage prepaid, to:

William B. Federman
Stuart W. Emmons
DAY HEWETT & FEDERMAN
One North Hudson
Sixth Floor
Oklahoma City, OK 73102

Robert Fain
P.O. Box 222581
Carmel, CA 93922-2581

Steven A. Heath

Dirich\Dismiss.wop

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JESSE WATSON,

Petitioner,

vs.

DAN REYNOLDS,

Respondent.

No. 93-C-707-E

ORDER

Before the Court are Respondent's motion to dismiss for failure to exhaust state court remedies, Petitioner's response and supplemental response, and Petitioner's motions for a writ of habeas corpus and to supplement.

In this proceeding, Petitioner attacks his April 1993 conviction in Case No. CF-92-1796, in the District Court of Tulsa County. In his motion to dismiss, Respondent asserts that Petitioner has not presented any of the issues raised in this petition before the Oklahoma Court of Criminal Appeals. In his supplemental response, Petitioner notifies the Court for the first time that an assistant public defender filed a petition in error in the Oklahoma Court of Criminal Appeals on or about October 11, 1993.

The Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 111 S. Ct. 2546, 2554-55 (1991). To

13

exhaust a claim, Petitioner must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

It is clear from the record in this case that the Petitioner has not exhausted his state remedies as he has a pending direct appeal. See Sherwood v. Tomkins, 716 F.2d 632, 634 (9th Cir. 1983) (even if the claim petitioner raises in federal court has been fairly presented once to the highest state court, petitioner has not exhausted his state remedies if he has a pending direct appeal in state court); Parkhurst v. State of Wyoming, 641 F.2d 775, 776 (10th Cir. 1981) (court properly denied habeas corpus relief for failure to exhaust state remedies because direct criminal appeal was pending). Therefore, the Court concludes that this petition for a writ of habeas corpus should be dismissed.

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Respondents' motion to dismiss [docket #7] is **granted.**

(2) Petitioner's motions for a writ of habeas corpus and to supplement [docket #1 and #5] are **denied.**

(3) The petition for a writ of habeas corpus is **dismissed.**

SO ORDERED THIS 6th day of December, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM BROWN,

Plaintiff,

vs.

K-MART CORPORATION, a Michigan Corporation,

Defendant.

No. 93-C-573-E

JUDGMENT

An Order having been entered herein granting Defendant's Motion for Summary Judgment and denying Plaintiff's Motion for Partial Summary Judgment,

IT IS THEREFORE ORDERED that Judgment be entered in favor of Defendant and against Plaintiff.

ORDERED this 3rd day of December, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

24

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WANDA HAMPTON, Plaintiff, vs. CITY OF LOCUST GROVE, BOARD OF COUNTY COMMISSIONERS OF MAYES COUNTY, OKLAHOMA and RONNIE BENIGHT, Defendants.	)	Case No. 93-C-878-E Mayes County District Court Case No. CJ-93-279

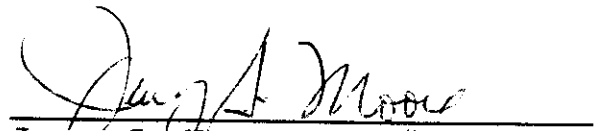
JOINT STIPULATION OF DISMISSAL

The Plaintiff, Wanda Hampton, and Defendant, the Board of County Commissioners of Mayes County, jointly stipulate to this matter being dismissed with Prejudice pursuant to (41) (a) (1) Fed. R. Civ. Proc. Wherefore, Plaintiff, Wanda Hampton and Defendant Board of County Commissioners of Mayes County, jointly stipulates that this matter be dismissed with Prejudice as to this Defendant only.

Respectfully submitted,

Chris J. Collins, OBA #1800
LEE, COLLINS & FIELDS, P.C.
818 N.W. 63rd Street
Suite 100
Oklahoma City, OK 73116
(405) 848-1983

ATTORNEY FOR BOARD OF COUNTY COMMISSIONERS OF MAYES COUNTY, OKLAHOMA



Jerry S. Moore, OBA #14110
BAKER & BAKER ATTORNEYS
303 West Keetoowah
Tahlequah, OK 74464
(918) 456-0618

ATTORNEY FOR PLAINTIFF, WANDA HAMPTON

1193stip.cjc

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MICHAEL W. McINTOSH,

Plaintiff(s),

vs.

No: 91-c-857-C

CITY OF TULSA, OKLAHOMA,

Defendant(s).

JUDGMENT DISMISSING ACTION BY REASON OF SETTLEMENT

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore, it is not necessary that the action remain upon the calendar of the Court.

IT IS ORDERED that the action is dismissed without prejudice. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown that settlement has not been completed and further litigation is necessary.

IT IS FURTHER ORDERED that the Clerk forthwith serve copies of this Judgment by United States mail upon the attorneys for the parties appearing in this action.

IT IS SO ORDERED this 2nd day of December, 1993.

UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE 12-2-93

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

AMERADA HESS CORPORATION,

Plaintiff,

vs.

DIAMOND SERVICES CORPORATION, et al.,

Defendants.

No. 91-C-920-E

FILED

DEC 2 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT

This action came on for jury trial before the Court, Honorable James O. Ellison, District Judge, presiding, and the issues having been duly tried and a jury having rendered its verdict,

Based on the percentages of negligence in this case (Defendant Fenstermaker, 70%; Defendant Diamond Services, 1%), as found by the jury,

IT IS THEREFORE ORDERED that the Plaintiff recover of the Defendant Fenstermaker the sum of $701,190.00 and Defendant Diamond Services the sum of $10,017.00, with interest thereon at the rate of 3.57 per cent as provided by law.

ORDERED this 2d day of December 2, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

134

GLH/JFP
10/26/93

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FLORA L. POWELL, Individually, and as Surviving Wife of HUBERT C. POWELL, Deceased, Plaintiff, vs. OWENS-CORNING FIBERGLAS CORPORATION, Defendant.	)	No. 88-C-555-E

DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, Flora L. Powell, and hereby dismisses all claims listed in the above-referenced suit as to the Defendant Owens-Corning Fiberglas Corporation (hereinafter OCF). Said Dismissal is with prejudice and each party is to bear her/its own cost.

NORMAN & EDEM, P.C.
Attorneys for Plaintiff

By: _____
GINA L. HENDRYX - OBA #10330
Renaissance Centre East
127 N.W. 10th Street
Oklahoma City, OK 73103-4927
405-272-0200 (O)
405-235-2949 (F)

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing document was on:

1-20-93 Mailed with postage prepaid thereon;

_____ Fax'd;

_____ Delivered;

to the following:

ATTORNEYS FOR OWENS-CORNING FIBERGLAS CORPORATION
Scott M. Rhodes, Esq.
Pierce Couch Hendrickson
Johnston & Baysinger
1109 N. Francis Ave.
P.O. Box 26350
Oklahoma City, OK 73146-0350
405-235-1611 (O)
405-235-2904 (F)
-AND-
Harmon Graves, Esq.
Tilly & Graves
3773 Cherry Creek North Drive
Suite 1001, Ptarmigan Place
Denver, CO 80209-3830
303-321-8811 (O)
303-321-7690 (F)

GINA L. HENDRYX

ENTERED ON DOCKET

DATE 12-3-93

FILED

DEC 2 1993

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SOUTHPORT EXPLORATION ASSOCIATES, INC., an Oklahoma corporation, DANIEL A. WOODS, an individual, and DENVER MINERAL EXPLORATION CORPORATION, a Colorado corporation,

Plaintiffs,

vs.

GEOPHYSICS INTERNATIONAL CORPORATION a Texas corporation, JEROME J. CONSER, an individual, and TELLURIC GEOPHYSICAL SERVICES, INC., a Texas corporation,

Defendants.

Case No. 91-C-392-E

Notice Of

DISMISSAL WITHOUT PREJUDICE

Plaintiffs, Southport Exploration Associates, Inc., Daniel A. Woods and Denver Mineral Exploration Corporation, do hereby dismiss each and every claim against the Defendants, Geophysics International Corporation, Jerome J. Conser and Telluric Geophysical Services, Inc. without prejudice, with each party to bear its own costs and attorneys fees.

Respectfully submitted,

HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C.

By: _____

Michael D. Cooke
Mark Banner
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74172
(918) 588-2700

ATTORNEYS FOR PLAINTIFFS, SOUTHPORT EXPLORATION ASSOCIATES, INC., DENVER MINERAL EXPLORATION CORPORATION, and DANIEL A. WOODS

CERTIFICATE OF MAILING

I the undersigned do hereby certify that on the 2nd day of December 1993, a true and correct copy of the above and foregoing instrument was forwarded by U.S. Mail, with proper postage thereon fully prepaid, to the following counsel of record:

John A. Spinuzzi
P.O. Box 50958
Denton, Texas 76206

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

FRASIER & FRASIER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 92-C-1188B
	)	(cons. w/93-C-0227B)[1]
MID-CENTURY INSURANCE COMPANY, a foreign insurer,	)	
	)	
Defendant.	)	

FILED

DEC 2 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, the Plaintiff, Frasier & Frasier, hereby stipulates with the defendant, Mid-Century Insurance Company, that this action shall be dismissed with prejudice. Each party is to bear its own costs and attorney fees.

Respectfully submitted,

FRASIER & FRASIER

By _____
James E. Frasier, OBA #3108
1700 Southwest Blvd., Suite 100
Post Office Box 799
Tulsa, Oklahoma 74101
(918) 584-4724

ATTORNEYS FOR PLAINTIFF

WILBURN, MASTERSON & SMILING

By _____
Ray H. Wilburn, OBA #9600
Philard L. Rounds, OBA #7780
Executive Center II
7134 South Yale, Suite 560
Tulsa, OK 74136-6337
(918) 494-0414

ATTORNEYS FOR DEFENDANT

[1] Mid-Century Insurance Company v. Renee Williams, 93-C-0227B

blc

FILED

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DEC 2 1993

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

M. IRENE LOOTS,

Plaintiff,

-vs-

FARMERS INSURANCE COMPANY, INC.,

Defendant.

No. 92-C-784-B

ORDER OF DISMISSAL WITH PREJUDICE

ON this 2nd day of dec, 1993, the Joint Application of the parties came on before the Court for hearing for an Order of Dismissal With Prejudice. The Court finds that said Order should be sustained as the parties have settled all issues.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above captioned matter be dismissed with prejudice as to filing herein.

UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

APPROVED AS TO FORM:

ANTHONY P. SUTTON,
Attorney for Plaintiff

DENNIS KING,
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

APPLIED ENERGY SYSTEMS, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 93-C-627-B
	)	
WILLIAM R. RILEY,	)	
	)	
Defendant.	)	

STIPULATION OF DISMISSAL OF COUNTERCLAIM

William R. Riley, defendant and counterclaimant herein ("Riley"), and AES Applied Energy Systems, Inc., plaintiff herein ("AES"), hereby stipulate pursuant to F.R.C.P. 41 to the dismissal without prejudice of the counterclaim filed by Riley against AES on August 18, 1993.

Respectfully submitted,

Neal Tomlins, OBA No. 10499
Ronald E. Goins, OBA No. 3430
TOMLINS & GOINS
A Professional Corporation
21 Centre Park
2642 E. 21st Street, Suite 230
Tulsa, Oklahoma 74114
(918) 747-6500

Attorneys for the Defendant,
William R. Riley

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

NOEL C. WATERS,

Plaintiff,

vs.

ROBERTS EXPRESS, INC.;
PROTECTIVE INSURANCE COMPANY;
ROADWAY SERVICES, INC.;
TED GREENE d/b/a T.G.A.; and,
DAVID GIBSON,

Defendants.

Case No. 93-C-0206B

STIPULATION OF DISMISSAL

COME NOW the plaintiff and the defendant, and stipulate to a Dismissal with Prejudice of the above-captioned matter. In support of this Dismissal, the parties would advise the Court that this matter has been settled with a full and final Release executed.

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ATTORNEY FOR DEFENDANTS, ROBERTS EXPRESS, INC., PROTECTIVE INSURANCE COMPANY, and ROADWAY SERVICES, INC.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BESSIE LAYTON, individually and next friend of JOSHUA LEE LAYTON and RACHEL LYNN LAYTON, minors,

Plaintiffs,

vs.

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF MAYES, SHERIFF WILEY BACKWATER, UNDERSHERIFF RONNIE PACK, DISPATCHER JANETTE WHITE,

Defendants.

92 C 066 B

ORDER OF DISMISSAL,
DEFENDANT, DISPATCHER JANETTE WHITE

FOR GOOD CAUSE SHOWN, the Defendant, Dispatcher, Janette White be and she is hereby dismissed from this action.

S/ THOMAS R. BRETT

JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RONENE FOSTER,

Plaintiff,

vs.

CREEK COUNTY YOUTH SERVICES, INC., an Oklahoma non-profit corporation, and MARY ESTEPP, as an agent and an individual,

Defendants.

Case No. 93-C-879-B

O R D E R

Now before the Court are the motions to remand to state court of Defendant Creek County Youth Services (Creek County)(docket #2) and Plaintiff Ronene Foster (Foster)(docket #4).[1]

This is an action filed by Foster in state court on September 10, 1993, arising out of Creek County's termination of Foster's employment. Defendant Mary Estepp (Estepp) was director, officer, and manager of Creek County and was sued in her capacity as an individual and as agent of Creek County. Foster alleges that she "was denied a due process pretermination hearing and contrary to the Public Policy of Oklahoma was terminated for blowing the whistle on Estepp," that her "U.S. Constitutional right to due process was violated," and that she is "entitled to punitive damages under Title 42 U.S.C. §1983." Based on these allegations,

[1] The Court notes that removing defendant Mary Estepp has not filed a response to the motions to remand, that the time for response has elapsed, and that pursuant to Local Rule 15(a), the motions are deemed confessed.

Defendant Estepp filed a Notice Of Removal on September 29, 1993, stating that these allegations "purport to establish a federal claim under the Constitution and Statutes of the United States for which reason original jurisdiction is vested in this court under 28 U.S.C. §§ 1331, 1343...." Creek County and Foster both filed objections to the removal.

All defendants must join in the petition for removal, or the petition is procedurally defective. Cornwall v. Robinson, 654 F.2d 685, 686 (10th Cir. 1981). "§1446(a) has been interpreted to mean that all defendants in multi-defendant cases must join in the petition for removal or consent to such action within the 30 day time limitation applicable to removal procedures." McCurtain County Production Corporation v. Cowett, 482 F.Supp 809, 812 (E.D. Okla. 1978). As a general rule, all defendants who may join in the removal must do so. Id. The exceptions to this rule are 1) if a separate and independant removable claim is joined with nonremovable claims, only the defendants to the removable claim need seek removal; 2) a nominal, informal or improperly joined party need not join in removal; and 3) a nonserved, nonresident defendant need not join in removal. Id. at 812, 813.

In the present case, not only did Creek County fail to join in the removal, it timely objected to the removal. Moreover, none of the exceptions to the rule requiring all defendants to join in the removal are applicable in this case. The first exception has been explained as follows: "When a separate and independent claim that is removable under 28 U.S.C. § 1441(c) is joined with other nonremovable claims, only the defendant or defendants to the

separate and independent claim need seek removal." Id. Plaintiff's Complaint contains a §1983 claim that is made against both Defendants. Thus there is no removable claim joined with a nonremovable claim where Estepp (the removing defendant) is the only defendant to the removable claim.[2] Also, Creek County had been served at the time of removal, and is not a nominal, informal, nor improperly joined party. Therefore, the Court finds that the motions for remand of Creek County and Foster should be and hereby are GRANTED. The Court further finds that sanctions are not appropriate in this case and that Foster's request for sanctions should be and hereby is DENIED.[3]

IT IS SO ORDERED THIS 15 DAY OF DECEMBER, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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[2] 42 U.S.C. §1983 state and federal concurrent jurisdiction has long been recognized. Carter v. City of Emporia, Kansas, 815 F.2d 617, 621 (10th Cir. 1987)

[3] The Court notes that Plaintiff's request for sanctions is contained in her motion to remand which was untimely filed.